

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part IV—Hearsay (MRE Article VIII)

2.40 Hearsay Exceptions

I. Declarant Unavailable—MRE 804, MCL 768.26

Insert the following text after the January 2006 update to page 112:

In *People v Jones*, ___ Mich App ___, ___ (2006), the Court first affirmed that the admission of an unavailable witness’s testimonial statement does not violate the Confrontation Clause if the defendant caused the witness to be unavailable. Concurring with *United States v Cromer*, 389 F3d 662 (CA 6, 2004), the *Jones* Court determined that because the witness’s unavailability was procured by the defendant’s wrongdoing, the defendant forfeited his constitutional right to confront that witness. In *Jones*, the only eyewitness to a shooting identified the defendant as the shooter in a statement to police. However, the witness refused to testify at trial regarding defendant’s involvement in the shooting. At a separate hearing regarding his refusal to testify, the witness stated “that he feared retribution if he testified, particularly because certain individuals were present in the courtroom.” *Jones, supra* at ___. The trial court admitted the witness’s statement to police into evidence under MRE 804(b)(6). The Court of Appeals rejected defendant’s assertion that the prosecutor failed to establish that defendant “engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness,” as required by MRE 804(b)(6). The Court of Appeals concluded that evidence that members of a gang to which defendant belonged threatened the witness satisfied the rule’s requirements.

CHAPTER 3

Civil Proceedings

Part III—Discovery (MCR Subchapter 2.300)

3.29 Independent Medical Examinations

B. Report of Physician, Physician's Assistant, or Certified Nurse Practitioner

Effective March 9, 2006, 2006 PA 49 amended the statute governing independent medical examinations to provide that reports from a physician's assistant or certified nurse practitioner must also be delivered to the person examined. Change the title of subsection (B) as indicated above and replace the first sentence at the top of page 192 with the following text:

A copy of the report and findings by the examining licensed physician, licensed physician's assistant or certified nurse practitioner shall be provided to the person examined or his or her attorney, MCL 600.1445(3), and also to the party causing the examination, MCR 2.311(B).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.14 Double Jeopardy

C. Multiple Punishments for the Same Offense

Insert the following text after the May 2005 update to page 317:

Where the statutory language expressly states that a penalty imposed under the home invasion statute does not preclude the imposition of a penalty under other applicable law, the Legislature clearly intended to allow multiple punishments for criminal conduct occurring during the same incident from which a defendant's home invasion conviction arose. *People v Conley*, ___ Mich App ___, ___ (2006). Therefore, in *Conley*, the defendant's convictions of first-degree home invasion and felonious assault did not violate the defendant's constitutional protection against double jeopardy. *Id.*

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

E. Was a Warrant Required?

5. Consent

Consent by third person:

Insert the following text at the bottom of page 342:

A warrantless search of a shared dwelling conducted pursuant to the consent of one co-occupant when a second co-occupant is present and expressly refuses to consent to the search is unreasonable and invalid as to the co-occupant who refused consent. *Georgia v Randolph*, 547 US ___, ___ (2006).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

G. Is Exclusion the Remedy if a Violation Is Found?

2. Inevitable Discovery Exception

Insert the following text before the last paragraph in this sub-subsection on page 348:

When a witness's identity is obtained through a violation of the defendant's Sixth Amendment right to counsel, the witness's testimony is inadmissible under the exclusionary rule unless the prosecution establishes an exception to the rule, e.g., that the evidence would have been inevitably discovered by means independent of the constitutional violation. *People v Frazier*, ___ Mich App ___, ___ (2006).

3. Independent Source Exception

Insert the following text after the paragraph in this sub-subsection on page 348:

See also *People v Frazier*, ___ Mich App ___, ___ (2006) (the testimony of witnesses identified during the unconstitutional interrogation of the defendant need not be excluded if the prosecution can establish that the identity of the witnesses would have been discovered by means independent of the constitutional violation).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.25 Search Warrants

F. Anticipatory Search Warrants

Insert the following text after the existing paragraph near the top of page 360:

Anticipatory search warrants do not violate the Fourth Amendment's warrant clause. *United States v Grubbs*, 547 US ___, ___ (2006). In *Grubbs*, the United States Supreme Court also held that the condition triggering execution of the warrant need not be stated in the warrant; the Fourth Amendment's "particularity requirement" demands only "the place to be searched" and "the persons or things to be seized" be set forth in a warrant.

CHAPTER 4

Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.38 Jury Trial

C. Voir Dire

2. Peremptory Challenges

Insert the following text after the partial paragraph at the top of page 407:

By peremptory order dated March 8, 2006, the Michigan Supreme Court vacated *People v Barron (Barron I)*, unpublished opinion per curiam of the Court of Appeals, decided March 22, 2005 (Docket No. 251402), and remanded the case to the Court of Appeals for reconsideration in light of the Supreme Court's decision in *People v Bell*, 473 Mich 275 (2005). *People v Barron (Barron II)*, ___ Mich ___ (2006).

In *Barron I*, the Court of Appeals concluded that error requiring reversal occurred when the trial court wrongly refused to allow the defendant to exercise his final peremptory challenge during jury selection. However, in dicta in *Bell*, the Michigan Supreme Court indicated that a trial court's improper denial of a party's exercise of its peremptory challenges is subject to a harmless error standard of review. *Bell, supra* at 293. According to the Michigan Supreme Court, "to the extent that [it] hold[s] that a violation of the right to a peremptory challenge requires automatic reversal," *People v Schmitz*,* a decision on which the Court of Appeals relied in deciding *Barron I*, is no longer binding precedent. *Bell, supra* at 293.

*231 Mich App 521 (1998). Also cited in the third line of the partial paragraph at the top of page 407.

CHAPTER 4

Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.41 Confrontation

A. Defendant's Right of Confrontation

4. Unavailable Witness

Insert the following text after the January 2006 update to page 415:

The inadmissibility of testimonial evidence as explained in the United States Supreme Court's decision in *Crawford v Washington*, 541 US 36 (2004), does not preclude admission of prior testimony given by a witness made unavailable at trial by the defendant's own conduct. *People v Jones*, ___ Mich App ___, ___ (2006). According to the *Jones* Court:

“[T]he United States Supreme Court did not intend to deem testimonial hearsay evidence, as in the present case, inadmissible based on a witness's unavailability and the lack of a prior opportunity for cross-examination if the defendant is responsible for procuring the witness's unavailability.

* * *

“Defendant's constitutional right to confrontation is waived under the forfeiture by wrongdoing doctrine if hearsay testimony is properly admitted because the declarant's unavailability was procured by defendant's wrongdoing.” *Jones, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.43 Defendant's Conduct and Appearance at Trial

A. Presumption of Innocence

3. Gagging

Insert the following text before subsection (B) on page 418:

A defendant is not denied his right to a fair trial when, after the defendant has interrupted the court proceedings on several occasions, the trial judge threatens to tape the defendant's mouth shut if the defendant continues his disruptive verbal outbursts. *People v Conley*, ___ Mich App ___, ___ (2006).

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

B. Sentencing Guidelines

Insert the following text after the first full paragraph on page 449:

The requirement that a trial court articulate the reasons for imposing a sentence may be satisfied by the court's explicit or implicit indication that it relied on the sentencing guidelines in fashioning the sentence imposed. *People v Conley*, ___ Mich App ___, ___ (2006).

Insert the following text after the first sentence in the last full paragraph on page 449:

A defendant must be resentenced when he or she is sentenced pursuant to a cell range based on inaccurate guidelines scoring or calculation, even if the sentence imposed under the erroneous cell range is within the cell range indicated after any errors are corrected. *People v Francisco*, ___ Mich ___, ___ (2006).

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.58 Sentencing—Sexually Delinquent Person

C. Application

Delete the content of the November 2005 update to page 463 and insert the following:

By peremptory order dated March 10, 2006, the Michigan Supreme Court vacated the Court of Appeals opinion in *People v Buehler (On Remand)*, 268 Mich App 475 (2005), and remanded the case to that Court to consider “whether any term of imprisonment that may be imposed by the circuit court is controlled by the legislative sentencing guidelines or by the indeterminate sentence prescribed by MCL 750.335a.”* *People v Buehler*, ___ Mich ___ (2006).

*The Court of Appeals was also ordered to consider whether the trial court gave substantial and compelling reasons for its acknowledged departure from the guidelines.